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No. 84-258

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. SCHAPANSKY, *et al.*,
*Petitioners,*

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITIONERS' REPLY MEMORANDUM

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## PETITIONERS' REPLY MEMORANDUM

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The central, and almost exclusive, point in respondent's 3-page brief in opposition is the following misinformed statement: "The Court denied certiorari in *Campbell* on October 9, 1984, and petitioners have not presented any basis on which to distinguish their claims or any independent reason justifying review." Br. in Opp. 2. In addition, it is obvious error for respondent to state that, "All of the questions presented in this petition were also presented in the petition in *Campbell* [*v. Department of Transportation*, No. 84-78]." [1] The peti-

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[1] For example, neither the petition nor the opposition in *Campbell* mentions the significant issues raised in question 5 in the petition herein. Supreme Court Rule 21.1(a) provides that "Only the questions set forth in the petition or fairly included therein will be considered by the Court." Therefore, the Court, in denying the

tion herein presented differing issues; it focused on relevant conflicts among and between the circuit courts, and it highlighted suggestions and requirements of this Court that favor certiorari review under Sup. Ct. R. 17.1—none of which were mentioned in the *Campbell* petition or respondent's oppositions in *Campbell* or the present case.[2]

Furthermore, respondent mischaracterizes a conflict that *is* discussed in the petition herein and the *Campbell* petition. Respondent's opposition in *Campbell*, which it relies upon herein, claims that in *United States v. McCubbin*, No. 81-2059 (10th Cir. Aug. 22, 1983)—

> a reasonable doubt existed with respect to the defendants' failure to obey a back-to-work order because their absences could have been due to resignations rather than participation in the strike. Here, by contrast, petitioners have not argued that their removal was improper because they had resigned first.

*Campbell* Br. in Opp. 7-8 n.6. In *McCubbin*, a decision involving the same August 1981 PATCO strike involved

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petition for certiorari in *Campbell*, could not have considered questions that were not included therein, but which were included in the petition herein. "Rule 23(a)(c) [21.1(a)] means that the Court will generally limit its consideration of the case 'to the question specifically brought forward by the petition.' *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-178." R. Stern & E. Gressman, *Supreme Court Practice* 457 (5th ed. 1978) (footnote omitted).

[2] *E.g.*, Pet. i, 11-12 (discussion of *Ommaya v. National Institute of Health*, 726 F.2d 827, 830-31 & n.5 (D.C. Cir. 1984) and the principles enunciated in *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); Pet. i, 13-15 (conflict involving the present case, *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) and *Parsons v. Department of the Air Force*, 707 F.2d 1406, 1410, 1412 (D.C. Cir. 1983).

in this case, the Tenth Circuit did not even mention a "resignation" factor or analysis, no less rely upon it.[3]

Moreover, respondent's attempt to equate this case with *Campbell* ignores a critical factual distinction with regard to the shortened notice period provided to petitioner Baracco in the present case. The *Campbell* decision, petition and opposition depend upon whether notices requiring a response "within seven calendar days after you receive this letter" violate the statutory entitlement to "a reasonable time, *but not less than 7 days*" to respond. 5 U.S.C. § 7513(b)(2) (emphasis added); *Campbell* Pet. 19; *Campbell* Br. in Opp. 9; *Schapansky* Br. in Opp. 2-3. As discussed in Judge Nies' concurrence below, Pet. App. A 34a-36a, and the petition herein at 10 & n.7, this issue is inapplicable to petitioner Baracco; the Merit Systems Protection Board found correctly that the agency *erred* by actually providing him less than a period indisputably below the irreducible statutory minimum number of days to reply to charges.

Finally, of course, the Court's denial of the *Campbell* petition for certiorari lacks precedential value with respect to the petition herein.[4] The Court has not hesi-

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[3] Respondent's misreading of *McCubbin* appears to evolve from its confusion in the briefs below of *McCubbin* and *United States v. Martinez*, 686 F.2d 334 (5th Cir. 1982); this misreading was adopted by the court of appeals, Pet. App. 25a. Only *Martinez* involved any reference to a possible "resignation" analysis, and *McCubbin* did not cite *Martinez*. *See* Pet. 19-21.

[4] The petition herein was filed and hand-delivered to respondent on August 16, 1984. Prior to its September 17, 1984 deadline herein, respondent sought a 30-day extension of time. Respondent then filed a 3-page opposition herein, on October 18, 1984 (received by petitioners in the mail on October 23, 1984). Apparently, respondent "needed" 63 days to write its opposition herein, despite the fact that it relies almost exclusively on its *Campbell* opposition, which was filed on September 12, *before* respondent's initial deadline herein. The effect of these tactics was to delay distribution to the Court of the petition herein until the Court acted upon the limited and distinguishable petition in *Campbell*. If the *Campbell*

tated in proper cases to grant certiorari even after denying similar petitions in related cases or even in the same case.[5]

For the foregoing reasons and those expressed in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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petition were as similar to the petition herein as respondent's current opposition would have the Court believe, it is curious that respondent had to request and fully utilize such a lengthy extension of time to file its slim *"see Campbell"* opposition.

[5] It is well-settled that denial of certiorari does not imply the Court's view of the merits. *Hathorn v. Lavorn*, 457 U.S. 255, 262 n.11 (1982) (previous denial of petitioners' petition for a writ of certiorari does not preclude Court from examining questions decided in lower courts); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) (prior dismissal of certiorari as improvidently granted did not establish law of the case nor amount to res judicata on the points raised). Hence, a denial is not a precedent for like action in a similar case; nor is it authority which may properly be cited in support of any proposition of law. R. Stern & E. Gressman, *Supreme Court Practice* 345 (5th ed. 1978). *See, e.g., Polites v. United States*, 364 U.S. 426, 433 n.9 (1960) (petition for certiorari granted although certiorari was previously denied in three cases involving similar issues).